Filed 12/27/18 Glendale Coalition etc. v. City of Glendale CA2/5

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

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| GLENDALE COALITION FOR BETTER GOVERNMENT, INC.,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>CITY OF GLENDALE,<br><br>Defendant and Appellant. | B282410<br><br>(Los Angeles County Super. Ct. No. BS153253) |

APPEAL from judgment of the Superior Court of Los Angeles County, James C. Chalfant, Judge. Affirmed in part, reversed in part.

Colantuono, Highsmith & Whatley, Michael G. Colantuono, David J. Ruderman, Jon R. di Cristina; Michael

J. Garcia and Dorine Martirosian, for Defendant and Appellant.

Krause, Kalfayan, Benink & Slavens, Eric J. Benink and Benjamin T. Benumof, for Plaintiff and Appellant.

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Defendant, appellant, and cross-respondent City of Glendale appeals from portions of a judgment in favor of plaintiff, respondent, and cross-appellant Glendale Coalition for Better Government in this case challenging the City's water rates. On appeal, the City contends the water rates properly (1) included a public fire protection fee; (2) allocated variable base costs to residential ratepayers in tiers based on volume of use; and (3) distinguished between outdoor water use by residential and irrigation ratepayers. We conclude: The public fire protection fee provided through hydrants is not a service available to the general public in substantially the same manner as it is to the property owners who pay the fee. Charging the fire protection fee to property owners, therefore, did not violate article XIII D, section 6, of the California Constitution. The City failed to support that its tiered rates for residential ratepayers were proportional to the cost of its base services. The rates therefore violate article XIII D, section 6(b)(3), of the California Constitution. The City's different rates for outdoor water use by residential and irrigation customers do not exceed the proportional cost of service to those classes of customers and comply with article XIII D, section 6.

The Coalition appeals from the portion of the judgment finding that the City's "peaking factors," which impose higher rates to account for peak demand, were reasonable within the residential classes. The Coalition contends the peaking factors violate the California Constitution. We conclude the peaking costs do not exceed the proportional cost of service and comply with article XIII D, section 6.

We reverse the portion of the judgment issued in favor of the Coalition that challenged the inclusion of the public fire protection fee in the fixed rates. We affirm the portion of the judgment issued in favor of the Coalition that challenged the City's variable rates for residential customers. We note, however, that those variable rates violate article XIII D, section 6, only because they incorporate a cost for base services that is not proportional to the cost of service. The variable rates for residential customers do not run afoul of section 6 insofar as they were developed with different peaking factors applied to different tiers of consumption. Nor do the variable rates run afoul of section 6 because the resulting rates for residential customers are higher than for irrigation customers.

## FACTS

### Glendale's Adoption of Water Rates in 2014

The City provides water to its customers through a blend of groundwater, recycled water, and purchased water.

In 2014, the City retained a consultant to prepare a cost of service analysis and rate study. The rate study "incorporate[d] American Water Works Association (AWWA) recommended methodologies tailored to meet the City's unique characteristics" and aimed to comply with articles X and XIII D of the California Constitution. On August 5, 2014, following a noticed hearing, the City Council passed a resolution that adopted a schedule of new water rates for the fiscal years ending in 2015 through 2018.

## Rate Design

The rate design divides customers into four classes: single-family residential (SFR), multi-family residential (MFR), commercial, and irrigation. The water rates are designed to obtain approximately 30 percent of rate revenues from fixed charges and approximately 70 percent of rate revenues from variable charges.

### A. The Fixed Rates (Including the Public Fire Protection Fee)

The fixed rates charged to customers recover costs that do not vary with the volume of water consumed, such as administrative costs. The fixed rates include, among other charges, a monthly fee for private and public fire protection costs associated with hydrants, private fire services, and the additional capacity required to accommodate fire flow volumes and pressures in case of emergency. Private fire

line service is a water connection used solely for a private standby service. Public fire protection service is based on the number of public fire hydrants. Fire flow costs provide adequate water quantities and pressures to meet firefighting needs throughout the distribution system.

The rate study incorporated a June 30, 2014 memorandum from the Glendale Fire Chief with regard to fire protection fees. The memorandum states that the fire department "utilizes the City's fire hydrants throughout the City exclusively for the purposes of suppressing and extinguishing fires related to properties – both vacant and occupied. [¶] Other fires, such as, but not limited to, wild-land/brush fires, structure fires, vehicle fires or other tangible property fires are extinguished by utilizing resources from the fire engines and/or manual extinguishers."

### B. Variable Rates (Including Base and Peak Costs for Customer Classes)

The variable rates charged to customers recover water supply costs, base costs, and peak costs.[1] Water supply costs

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[1] Each of the City's variable rates for a particular class of customer are charged on a per unit basis, and each rate is set to recover water supply costs, plus base costs and peak costs as part of the rate. Because the Coalition challenges components of the City's variable rates for residential customers (i.e., base costs and peak costs), we separately

include the costs for pumping groundwater, producing recycled water, and purchasing imported water. Every water customer in every class pays the same amount ($2.19 per unit) for water supply costs. The amount charged customers for water supply costs accounts for 53.1 percent of all utility costs.

Base costs are costs that vary with water use under average demand conditions. Base costs represent the costs that would be incurred if water consumption occurred evenly from day to day and from hour to hour, so that the system did not need extra capacity to meet peak period demands. The City analyzed fiscal year 2013 water consumption data to determine the percentage of total base costs to allocate to each of the four customer classes based on their respective demand; percentages were calculated by dividing each class's annual consumption by the total annual consumption of all four classes combined.

Peak costs, or "extra capacity costs," represent the City's costs to meet customers' maximum consumption. Demand on the water system that is greater than average water use is often expressed as a ratio of the demand during the highest use month over the average monthly demand for the year. The City calculated this specific ratio, called a "peaking factor," for each of the four customer classes by analyzing water consumption data for the 2013 fiscal year. The peaking factor for each class represents the extra

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discuss the Coalition's legal challenges to individual components that together comprise variable rates.

demand that the customer class places on the system during times of maximum water demand. The City determined each class's proportionate share of the total water consumption at peak consumption, expressed as a percentage calculated based on the class's demand divided by total demand.

Based on the 2013 consumption data, the single family residential class comprised 40.1% of the base demand and 45.0% of the peak demand. The irrigation class, which consisted of separately metered accounts that use water only outdoors, comprised only 4.6% of the base demand and 5.2% of the peak demand. Single family residences comprised the majority of both base and peak demand. Based on water use in the 2013 fiscal year, the City calculated an average peaking factor of 1.82 for the single family residential class, and 1.84 for the irrigation class.

To determine the dollar costs to allocate to each customer class in the setting of rates, the City analyzed its own costs by function, and projected the annual costs it would incur to deliver base services and peak services to its entire customer base. Using a six-year average of projected costs, and costs projected for specific fiscal years, the City allocated projected base costs and projected peak costs among its four customer classes based upon the demand percentages. For example, rates for the irrigation class were developed to recover 4.6% of total base costs and 5.2% of total peak costs.

### C. Tiered Rates for Base Costs Within Residential Customer Classes

Within the two residential classes (SFR and MFR), the City divided each class into different "tiers" based on the amount of water used in a particular month, and developed different rates for each tier of consumption. Based on an updated analysis of water consumption in Glendale, a community profile from the City's Consolidated Plan, and Environmental Protection Agency (EPA) standards regarding efficient indoor and outdoor water use, the City divided the single family residential class into four tiers of consumption and the multi-family residential class into two tiers of consumption. For the single family residential class: The City established the volume range for Tier 1 at 0 to 6 units, which reflects the efficient use of water for a typical smaller household's indoor use. The City set the volume range for Tier 2 from 6.1 to 12 units, which reflects an efficient use of indoor water for larger households. Tiers 3 and 4 were designed to address customers who use water for outdoor consumption. The City set the volume for Tier 3 to range from 12.1 to 25 units, with the average monthly consumption for Glendale's single family residences, approximately 18 units, falling in the middle of the tier. Approximately 30 to 70 percent of the water consumed by a typical single family residence is used outside. The City defined Tier 3 to encompass 52 percent of a single family residential customer's outdoor water use before moving into Tier 4. Tier 4 applies to volumes over 25 units and extends

to 44 units; the City defined the top end of Tier 4 based on prior use data showing single family residences are unlikely to use more than 44 units per month. Tier 4 represents the most wasteful use of water, but represents less than 10 percent of customers.

To develop its single family residential rates, the City allocated the total cost of providing base services to the single family residential class among the four tiers. The City determined the total base cost for the class was $1,680,693 based on a six-year average of costs. The City allocated these base costs to each of the four tiers based upon the number of units of water available to a given customer in each tier divided by the maximum projected use of 44 units (i.e., six units in Tier 1 (as the tier is defined as use from 1 to 6 units); six units in Tier 2 (as the tier is defined as use from 6 to 12 units); 13 units in Tier 3 (as the tier is defined as used from 12 to 25 units); and 19 units in Tier 4 (as the tier is defined as use from 25 to 44 units)). After allocating base costs among the tiers, the City calculated a unit rate for base costs consumed in each tier. Specifically, the City used historical data to project the total number of units that would be consumed by all single family residential consumers and the total number of units projected to be consumed in each tier. Lastly, the City divided the amount of the base costs assigned to a tier by the total number of units projected to be consumed in that tier to produce a per

unit base cost.[2]

### D. Peaking Factors for the Residential Tiers

The City calculated peaking factors for each tier within the residential classes as well. The peaking factors are used to capture costs for pipe size, reservoir size, and maintenance for delivering peak service to each tier. Within the single family residential class, the City assigned a peaking factor of 1.0 to Tier 1 based on a mathematical judgment that the most efficient use of water, associated with indoor use, does not contribute to peak demand. The City placed the average peak demand factor for single family residential customers of 1.82 with the average base demand in Tier 3, reasoning that the average user would have average peak demand. From the factors established for Tiers 1 and 3, the City interpolated peaking factors of 1.26 for tier 2 and 2.31 for Tier 4.

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[2]

| Tier | Size of Tier | % of Base Cost Allocation | Amount Allocated | Projected Annual Base Consumption * | Unit Charge |
|---|---|---|---|---|---|
| 1 | 6 | 13.64% | $229,144 | 1,568,261 | $0.146 |
| 2 | 6 | 13.64% | $229,144 | 1,206,291 | $0.189 |
| 3 | 13 | 29.55% | $496,480 | 1,297,325 | $0.382 |
| 4 | 19 | 43.18% | $725,595 | 739,798 | $0.98 |
| Total | 44 | 100% | $1,680,693 | 4,811,675 | |

* Figures reflect hundred cubic feet

### E. Variable Rates

For each fiscal year (ending in June 2015 through 2018), the City calculated a single variable rate for its irrigation customers, a single variable rate for its commercial customers, four tiered rates for its single family residential customers, and two tiered rates for its multi-family residential customers. Each rate includes within it the same charge for water supply ($2.19 per unit), plus a unique charge meant to represent a proportional share of the customer's base and maximum (peak) costs.[3] For the fiscal year ending in 2015, for example, the City's resolution set the variable rate for irrigation customers at $2.90 per unit, and for single family residential customers at $2.27 per unit in Tier 1 (the first six units consumed), $2.80 per unit (for the next six units consumed), $3.18 per unit (for the next 13 units consumed), and $3.86 per unit (for consumption of units above 25 units).[4]

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[3] The rate study indicates that, for SFR customers, the component of the variable rate attributable to base plus maximum costs for Tier 2 is 5.4 times higher than Tier 1; Tier 3 base plus maximum costs are 8.55 times higher than for Tier 1; and Tier 4 base plus maximum costs are 14.22 times higher than for Tier 1.

[4] The City developed a two-tier set of rates for multi-family residential customers using substantially the same methodology used in setting the single family residential

## PROCEDURAL HISTORY

In January 2015, the Coalition filed a petition for a writ of mandate. The Coalition alleged that the City's water rates violated article XIII D, section 6 of the California Constitution because: public fire protection services are available to the public at large in substantially the same manner as to property owners; base costs did not recover proportionate costs of service because they were based on potential consumption; peaking factors within the single family residential class were not based on actual increases in costs of service; and the City should not have charged more for outdoor residential use than irrigation.

The City filed an opposition explaining the method of allocating base costs by "distributing base costs to each tier in proportion of the volume of water in each tier." The City noted the Coalition had provided no evidence that the City's fire hydrants protect personal property, vacant lands, or structures without water service. The fire chief's memorandum established that fire hydrants protect improved property served by the water utility.

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rates. The variable rates adopted by the resolution for the fiscal year ending in 2015 were $2.38 per unit for the first five units consumed and $3.52 per unit for additional units consumed. Given that the legal analysis with respect to both SFR and MFR customer classes is identical, we forgo discussing the details of the MFR class, but our rulings regarding the SFR class apply equally to the MFR class.

The trial court granted the City's request for judicial notice in support of its opposition to the petition for writ of mandate. The request attached the "California Fire Code," including the 2013 version of California Code of Regulations, title 24, sections 507 and C101, and portions of the Glendale Municipal Code. The 2013 version of the California Code of Regulations mandated on-site fire hydrants and mains "[w]here a portion of the facility or building hereafter constructed or moved into or within the jurisdiction is more than 400 feet . . . from a hydrant." Title 16, Chapter 16.28, subdivision 020(B) of the Glendale Municipal Code provides that a subdivider must provide water distribution systems that include "pipelines, fire hydrants and any water storage facilities necessary to serve" a subdivision of improved property.

A hearing was held on January 19, 2017. The trial court's tentative ruling concluded that the City had not calculated the actual cost of service for the different tiers of residential customer usage, and there was no analysis of the extra cost for peaking within each tier. The City explained that the peaking factor of 1.0 for Tier 1 was based on a mathematical judgment that the most efficient use of water does not cause peak demand. The peaking factors for Tiers 2 and 4 were interpolated from the other peaking factors. The trial court found "the City's attempted peaking factor distinction for disparate treatment of the outdoor water usage of residential customers and the outdoor water usage of irrigators . . . suffers from a lack of supporting evidence."

The Coalition accepted the City's methods of calculating costs to operate the system, including an individualized cost to operate at peak usage, and agreed with the 1.82 peaking factor for the entire residential class. The Coalition objected to the City's allocation of base costs and peaking factors within the single family residential class. The City categorized cost distribution as a "legislative function," and that "there is no alternative" but to guess or estimate proportionate distribution of costs. The City referenced *Moore v. City of Lemon Grove* (2015) 237 Cal.App.4th 363 for the proposition that estimation on time spent is a "professional judgment" that meets the proportionality requirement of Proposition 218. Although the City argued that there was sufficient overlap between those who pay the fire protection fee and those who benefit, the court found the fire chief's memorandum was not credible and the evidence was insufficient to support the fire protection fee. Following argument, the court granted the petition on all bases except for the peaking factor calculation, noting that the City assigned the peaking factor of 1.0 to tier 1 based on a common sense assumption. The trial court continued the matter for further argument on the issue of intra-class peaking.

A hearing was held on January 24, 2017, on the issue of tiered peaking factors. The trial court noted the City calculated and allocated costs for delivering peak service to each single family residential tier. The City explained the methodology for establishing tiers within the residential

class based on the EPA's standards and the average peak demand. The City also stated that fractional demand in the single family residential tiers grows by 26 percent. The court concluded that the peaking factors were reasonable.

The trial court ruled in favor of the Coalition on the issue of outdoor water use for the reasons given in its tentative decision—that there was a lack of supporting evidence to distinguish between outdoor water use by irrigation customers and residential customers.

The trial court also stated that the City did not properly distribute base costs to tiers based on the tiers' "actual consumption of water." Only by knowing how much water a particular tier consumes could the City adequately distribute costs based on the cost of water actually delivered and consumed.

On February 22, 2017, the court issued a peremptory writ of mandate to the City to invalidate the City's current water rate structure for violating Proposition 218 regarding residential base rates and including fire protection costs in the fixed rates. The City filed a timely appeal, and the Coalition filed a timely cross-appeal.

## DISCUSSION

### Standard of Review

In a legal action contesting the validity of a fee or charge under Proposition 218, "'the burden shall be on the

agency to demonstrate compliance.'" (*Capistrano Taxpayers Assn., Inc. v. City of San Juan Capistrano* (2015) 235 Cal.App.4th 1493, 1504 (*Capistrano*), quoting Cal. Const., art. XIII D, § 6, subd. (b)(5).) Both the trial court and the reviewing court exercise their independent judgment to determine if the fee or charge meets the mandates of Proposition 218. (*Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 448 (*Silicon Valley*); *Capistrano*, *supra*, at p. 1507.) "[I]t is not enough that the agency have substantial evidence to support its action. That substantial evidence must itself be able to withstand independent review." (*Capistrano*, *supra*, at p. 1507, citing *Silicon Valley*, *supra*, at pp. 441, 448–449.)

Even when we exercise our independent judgment, we presume that the appealed judgment is correct, and do not decide disputed issues of fact. (*Moore v. City of Lemon Grove* (2015) 237 Cal.App.4th 363, 368–369 (*Moore*).) We do not provide any deference to the City's determination of the constitutionality of its rates. (*Morgan v. Imperial Irrigation Dist.* (2014) 223 Cal.App.4th 892, 912 (*Morgan*).)

**Statutory Scheme**

'"Proposition 218 added articles XIII C and XIII D to the California Constitution. Article XIII C concerns voter approval for local government general taxes and special taxes. Article XIII D sets forth procedures, requirements, and voter approval mechanisms for local government

assessments, fees and charges. We are concerned here with article XIII D, specifically certain provisions concerning fees and charges.' [Citation.]" (*City of Palmdale v. Palmdale Water Dist.* (2011) 198 Cal.App.4th 926, 931 (*Palmdale*).)

Subdivision (b) of article XIII D, section 6 provides that a fee or charge "shall not be extended, imposed, or increased by any agency unless it meets all of the following requirements: [¶] (1) Revenues derived from the fee or charge shall not exceed the funds required to provide the property related service. [¶] (2) Revenues derived from the fee or charge shall not be used for any purpose other than that for which the fee or charge was imposed. [¶] (3) The amount of a fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of the service attributable to the parcel. [¶] . . . [¶] (5) No fee or charge may be imposed for general governmental services including, but not limited to . . . fire . . . services, where the service is available to the public at large in substantially the same manner as it is to property owners."

"'The theme of these sections is that fee or charge revenues may not exceed what it costs to provide fee or charge services. . . . In short, the section 6(b) fee or charge must reasonably represent the cost of providing service.' (*Howard Jarvis Taxpayers Assn. v. City of Roseville* (2002) 97 Cal.App.4th 637, 647–648 (*Roseville*).)" (*Moore*, *supra*, 237 Cal.App.4th at p. 368.)

**Fire Protection Fee**

The Coalition challenged the portion of the fire protection fee used for public services and included in the City's fixed rates. On appeal, the City contends the fire protection fee it charges customers does not violate article XIII D, section 6, subdivision (b)(5), because the services supported by the fee are not available to the general public in substantially the same manner as to customers who pay the fee. Based on the record before us, we agree with the City.[5]

"Viewed in conjunction with section 6(b)(1) and (2), the purpose of section 6(b)(5) is to require that a fee or charge collected from ratepayers be used to pay for the service for which the fee or charge was imposed and not general governmental services." (*Moore*, *supra*, 237 Cal.App.4th at p. 376.) We must determine what the proceeds of the fire protection fee is used for to determine if the fee violates subdivision (b)(5). (See *Richmond v. Shasta Community*

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[5] The City also contends the fee does not violate Proposition 218 because the fire flow protections covered by the fee are required by law, and that special water districts would be powerless to fund fire flows without imposing a similar fee because they cannot tax. Because we agree the evidence supports the City's main contention that the services provided through the fire protection fee are not available to the general public in substantially the same manner as it is to its customers, we do not address these other contentions.

*Services Dist.* (2004) 32 Cal.4th 409, 425 [connection fee subject to section 6, subdivision (b)(5) because defendant used proceeds fee to purchase equipment for volunteer fire department, which provided firefighting and emergency medical services to the public at large].)

"On appeal from a determination of failure of proof at trial, the question for the reviewing court is '"whether the evidence compels a finding in favor of the appellant as a matter of law."' [Citation.] Specifically, we must determine '"whether the appellant's evidence was (1) 'uncontradicted and unimpeached' and (2) 'of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding.'"' [Citation.]" (*Almanor Lakeside Villas Owners Assn. v. Carson* (2016) 246 Cal.App.4th 761, 769.) We must indulge all intendments and presumptions in favor of the trial court's decision (*id.* at p. 770), but we need not rely on the trial court's interpretation or findings on undisputed evidence. (See *Silicon Valley*, *supra*, 44 Cal.4th at p. 450 [courts exercise independent judgment in reviewing whether assessments violate article XIII D]; *Morgan*, *supra*, 223 Cal.App.4th at p. 912 ["we exercise our independent judgment in reviewing the record" but "we do not take new evidence or decide disputed issues of fact"]; *Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 449 ["[w]hen no conflict in the evidence exists, however, the question of [legal significance] is purely one of law and the reviewing court engages in an independent review of the record"].)

In this case, the evidence establishes that, despite the nomenclature, "public fire protection" is not generally available to the public at large in substantially the same manner as it is to the property owners who pay the fee. The general public does not have access to water through fire hydrants. The fire chief's memorandum states that hydrants in the City are used to suppress and extinguish property fires within the City. Fire hydrants are required to protect subdivisions, buildings, and portions of buildings within City limits. Common sense dictates that fire hydrants are located and available to extinguish fires that threaten property damage. We have no evidence to contradict the undisputed evidence that other, more efficient methods of firefighting would be used to extinguish public fires unrelated to property. Although fire departments could conceivably use any available measure to extinguish a fire unrelated to real property, including hydrant water in the absence of an alternative, hydrants are not located, designed, or intended for all fires that happen to occur in public places, and the water pressure is excessive. The fact that hydrant water could be used for a purpose other than property protection in a hypothetical emergency does not mean it is available to the public at large in substantially the same manner as to property owners paying the fire protection fee. There is no evidence in the record to contradict the fire chief's memorandum, the fire regulations, or common sense. Nor do we have evidence to suggest that hydrants are uniformly distributed to locations in any way other than in proximity

to property such that members of the general public would have substantially similar access to the hydrants in any particular area in the City. The proceeds of the fire protection fee are used to provide firefighting services to developed properties; charging the fee in the water rates does not run afoul of section 6, subdivision (b)(5).

**Variable Base and Peak Costs**

The City contends the allocation of base costs to residential tiers was proportional to the cost of service. In its cross appeal, the Coalition contends that the peaking factors used within the residential classes violate article XIII D, section 6, subdivision (b)(3) because they are not tied to the cost of providing service. We conclude that the base cost distribution, reflected in base rates within the single family residential tiers, is not proportional to the cost of service, whereas use of the peaking factors are tied to the cost of providing service.

**A. Applicable Law**

"Article XIII D, section 6, subdivision (b)(3) of the California Constitution, as interpreted by our Supreme Court in *Bighorn–Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205, 221 (*Bighorn*) provides that water rates must reflect the "'cost of the service attributable'" to a given parcel. While tiered, or inclined rates that go up

progressively in relation to usage are perfectly consonant with article XIII D, section 6, subdivision (b)(3) and *Bighorn,* the tiers must still correspond to the actual cost of providing service at a given level of usage." (*Capistrano*, *supra*, 235 Cal.App.4th at pp. 1497–1498, fn. omitted.)

The City must "do more than merely balance its total costs of service with its total revenue" by correlating "its tiered prices with the actual cost of providing water at those tiered levels." (*Capistrano*, *supra*, 235 Cal.App.4th at p. 1506.) We recognize that "[a]pportionment is not a determination that lends itself to precise calculation. [Citation.] . . . 'The question of proportionality is not measured on an individual basis. Rather, it is measured collectively, considering all rate payors.' [Citation.]" (*Griffith v. Pajaro Valley Water Management Agency* (2013) 220 Cal.App.4th 586, 601 (*Griffith*).) Cost distribution methods "used by governments present a subject beyond the trial court's and our common experience and knowledge." (*Moore*, *supra*, 237 Cal.App.4th at p. 375 [court could not conclude cost allocation method was improper because plaintiff provided no expert testimony or authority showing defendant's methods were otherwise improper].) Nevertheless, grouping similar users together for the same rate and charging them according to usage is a reasonable way to apportion the cost of service even if there may be other methods to apportion costs. (*Griffith*, *supra*, at p. 601.)

### B. Base Costs

We conclude that the evidence does not reasonably support the City's distribution of base costs among the single family residential tiers, and therefore the variable rates developed using those tiers are not proportional to the costs of service.

The City utilized historical use data to calculate the total base costs to supply the single family residential class if water consumption occurred evenly from day to day. Utilizing the EPA standards and average monthly consumption within the single family residence class (approximately 18 units), the City designed four tiers, representing relative average uses of water. The tier structure reflects that customers in Tiers 1 and 2 demand less water than the average single family residence. Tier 3 encompasses the middle third of the range of consumption by single family residences. The City placed average monthly consumption in the middle of Tier 3. Customers in Tier 4 pay a greater amount to compensate for their above average demand for water. In theory, use of these tiers to develop differential rates could be appropriate, as the definition of the four tiers is logically sound, given usage data and studies. Indeed, the M1 Manual states that increasing-tiered structures may be considered, and indicates that it requires applying judgment regarding the number of tiers, the point at which one tier ends and the next begins, and the relative price level of each tier.

However, the M1 Manual also notes that use of these tiers is appropriate when the utility "[h]as the analytical capability to design [tiered] rate structures, including defining the amount of water sold per [tier], potential demand responses to differential rate impacts, and the development of the underlying costs of service for each [tier]." Because cost-of-service inequities pose an issue with this rate structure, the M1 Manual recommends using "information on water sales by [tier] of consumption," which can be developed through bill tabulation. Here, the City's method of distributing the overall base costs to each single family residential tier is not tethered to the proportional cost of service at each level of customer demand. The City concedes it developed its rates without any data that gave it the analytical capability to develop the underlying costs of service for each tier. The current rate structure distributes the overall base costs to each tier using the number of units of water available to a single customer in each tier (what the Coalition describes as a "tier width"), a measure that the City does not even try to relate to costs of service. The City's failure even to attempt to determine how its costs increased to supply water to residential customers at the higher tiers of consumption renders its tiered rate structure impermissible under Article XIII D, section 6, subdivision (b)(3). (*Capistrano*, *supra*, 235 Cal.App.4th at 1506 ["To comply with subdivision (b)(3), City Water had to correlate its tiered prices with the actual cost of providing water at those tiered levels."].)

We recognize that determining the costs of increased consumption at higher tiers does not impose on the City a requirement of inflexible precision or perfect data. (See *Morgan*, *supra*, 223 Cal.App.4th 892, 899, 915 [upholding rates based on a method of average use calculation where the district did not have clear data].) But, the challenge to the City's rates here is not based upon a dispute over the quality of data. Rather, as in *Capistrano*, the City "has never attempted to justify its price points based on *costs of service for those tiers*." (*Capistrano*, *supra*, 235 Cal.App.4th at 1507.) Indeed, the City concedes it has not provided any data to rationalize how the number of units of water available to a single customer in a tier relates to costs of service incurred by the City to deliver water to all customers within each tier. Yet, units available to a single customer within each tier is the basis for recovery of costs. (See *ante*, fn. 2.) Although we agree with the City that, absent the use of tiered rates, the residential rate structure may not reflect the increased demands placed on the system by above average water users, *Morgan* and the M1 Manual contemplate methods that can sufficiently tether base costs within successive tiers to the underlying cost of service for each tier. That has not been done here.[6]

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[6] As noted above, the variable rates for residential customers are developed to recover costs for water supply, base costs, and peak costs. In our disposition, we invalidate the variable residential rates, but based only on the Coalition's challenge relating to the allocation of base costs

### C. Peak Costs

Notwithstanding the lack of data or evidence to tether base cost distribution among the residential tiers, the City has provided sufficient evidence to meet Proposition 218's proportionality requirement for the peaking factors used to develop variable rates for the tiers in the residential classes. The City provided evidence establishing the "base level of consumption to which other tiers of water use are compared." The City attributed Tier 1 a peaking factor of 1.00 because Tier 1 users do not contribute to overall peak demand. Although every water user may contribute to peak demand during the peak hour of a peak day, the City is not required to calculate peak demand with such precision. The City utilized historical water usage data to determine the average consumption of water (18 units) and the average peaking factor for the single family residential class (1.82). The City assigned the average peaking factor to Tier 3, the tier representing the average single family residence. The Coalition does not dispute these findings, nor does the Coalition contend that peaking factors cannot properly

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among the various tiers of consumption. In the sections below, we discuss that the Coalition's other challenges to the residential variable rates – that they improperly include peaking factors based on different tiers of consumption, and that they improperly distinguish between irrigation and residential customers – are without merit.

reflect the incremental costs of providing water service in peak conditions.

The Coalition's primary argument is that peaking factors in Tiers 2 and 4 are not tethered to actual costs of service at those tiers, which it contends violates the principles set forth in *Capistrano*, *supra*, 235 Cal.App.4th 1493. We disagree. In *Capistrano*, the City of San Juan Capistrano adopted a tiered rate structure for residential water users. (*Id.* at p. 1498–1499.) The city based its tier 1 rate on the World Health Organization's guidelines concerning minimum quantities of water required for residential use. (*Id.* at p. 1499.) The higher tiers were based on typical landscapes, use of native plants, and the city's determination of excessive usages. (*Ibid.*) Utilizing *Palmdale* as support, the court of appeal in *Capistrano* found that the rates did not comply with Proposition 218 because the city had "never attempted to justify its price points as based on *costs of service for those tiers*" because it never attempted to calculate the incremental cost of water at each tier. (*Id.* at pp. 1499, 1507.)

The rate structure in this case is different because the City has justified peaking factors that apply to each tier. The City started with calculating a peaking factor for the single family residential class as a whole based upon comparing average monthly costs with high monthly costs, using historical usage and cost data. The City used cost data to project the functional costs it incurs to provide base service and peak service. The Coalition does not challenge

any of this data, or the methodology used to calculate single family residential average peaking. In its stated effort to meet the proportionality requirement imposed by Proposition 218 for peaking within tiers, the City set average peaking to correspond to average use in Tier 3; provided a reasoned explanation how Tier 1 usage did not contribute to increased demand for peaking; and "interpolated" relative peaking factors for Tiers 2 and 4 by comparing their relative volume to the average peaking factor to determine a peaking factor within each tier. These factors, alongside volume increments relative to each tier, "reflect[]the proportionate increase in the costs associated with additional demand placed on the system" by each tier. In effect, all single family residential customers are charged part of the cost of water service arising from peak demand proportionately to their own relative contributions to peak demand. Tiers 1 and 2 represent below average peak consumption, so they are charged a proportionately smaller rate than average peak demand, whereas an above average consumer (Tier 4) is charged a proportionately greater than average share. This form of calculus is all that is required by Proposition 218. (Compare *Capistrano*, *supra*, 235 Cal.App.4th at p. 1506; *Griffith*, *supra*, 220 Cal.App.4th at p. 601.)

Nor do we construe *Palmdale* as mandating an individualized cost of service data justification for each tier to be Proposition 218 compliant. There, the defendant water district adopted a tiered structure that imposed a charge per unit of water above a budgeted allocation depending on each

customer's classification. (*Palmdale*, *supra*, 198 Cal.App.4th at p. 930.) The city challenged the rates because the water district provided no justification for imposing a per unit charge for irrigation users who used a proportionately lower amount of their budgeted allocation as compared to residential and commercial users. (*Id.* at p. 934.)[7] The rate structure in this case responds to the issue in *Palmdale* by providing a reasoned cost justification based on extrapolations from uncontested data to charge increasing rates (i.e., the relative demand placed on the system to provide water in excess of average demand).[8]

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[7] An irrigation customer would pay $5.03 per unit whenever it exceeded 130% of its allocation of water, whereas a residential customer would pay the same per unit rate whenever it exceeded above 175% of its allocation. (*Palmdale*, *supra*, 198 Cal.App.4th at p. 937, fn. 3.)

[8] Given that the City has provided an appropriate cost justification, we need not reach the issue whether a stated goal toward water conservation pursuant to article X, section 2 also justifies the tiered peaking factors. Article X, section 2 provides in pertinent part: "[T]he water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water . . . is and shall be limited to such water as shall be reasonably required for the beneficial use to be served."

Although we agree with the Coalition that the City changed a part of its reasoning in calculating peaking factors in Tiers 2 and 4,[9] and that the rate study does not set forth a clear or concise explanation for how the City formulated the peaking factors, the Coalition nevertheless asks us to reweigh the evidence. "This we cannot do." (*Morgan*, *supra*, 223 Cal.App.4th at pp. 917–918 [substantial evidence applies to support a trial court's factual determination that the rate maker complied with section 6's substantive requirements through its reliance on a rate study].) The peaking factors within the single family residential class are reasonably tethered to the actual cost of service at each respective tier.

**Peaking Factors for Outdoor Residential Use and Irrigation**

The trial court granted the Coalition's petition with respect to its allegation that the City had not justified disparate treatment between the residential class and the

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[9] In its opposition to the petition for writ of mandate, the City set forth a formula that incorporated "average peaking" between tiers 1 and 3, a number calculated to be 0.82, to partially formulate peaking factors for tiers 2 and 4. On appeal, the City set forth the same formula except for changing the part of the formula to the "difference between peaking factors in Tiers 1 and 3," which is the correct calculation of 0.82. Notwithstanding the language used, the numbers in the formulas set forth by the City are the same.

irrigation class for rates charged for outdoor uses of water. The Coalition points to the fact that the City's rate for the irrigation class is only $2.90 per unit, while the rates for tiers 3 and 4 for SFR customers (rates the City concedes address outdoor use) are $3.18 and $3.86.[10] The Coalition argues that this disparity in rates is unwarranted given that the two classes have almost identical peaking factors (1.82 for SFR and 1.84 for irrigation). The City contends the disparate treatment of outdoor residential water use and irrigation is well supported by evidence. We agree with the City.[11]

The record supports disparate treatment of residential outdoor water usage and irrigation notwithstanding the

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[10] In light of our conclusion that the SFR tiered rates are not Proposition 218 compliant, the disparate dollar amounts would need to be changed, consistent with this opinion. We nevertheless address the merits of the Coalition's argument that irrigation customers are treated more favorably than SFR customers. A disparity would persist even assuming all SFR customers were charged the same average variable rate.

[11] Although the City failed to respond to the Coalition's argument below, the parties have been able to adequately brief the issue, so we exercise our discretion to determine this legal issue. (See *Farrar v. Direct Commerce, Inc.* (2017) 9 Cal.App.5th 1257, 1275; *Francies v. Kapla* (2005) 127 Cal.App.4th 1381, 1386.)

seemingly similar[12] peaking factors. *Palmdale*, *supra*, 198 Cal.App.4th 926 is illustrative. In that case, the rate structure established that irrigation customers would be charged variable rates reaching the highest tier (tier 5) when the customers consumed 130 percent of their budgeted allocation (an equivalent factor of 1.3), as compared to other users (within other classes) who did not reach that high of a tiered rate until they exceeded 175 or 190 percent (equivalent factors of 1.75 and 1.9) of their budgeted allocation. (*Id.* at p. 937, fn. 3.) The appellate court reversed the lower court's ruling upholding the rate structure because the water district defendant did not explain the cost disparity, and did not segregate the recognized outdoor and irrigation usage of residential or commercial users such that non-irrigation customers could ineffectively use water outdoors without the same proportional cost. (*Id.* at p. 937.)

The Coalition's claim is fundamentally different than in *Palmdale* in the following respect: the Coalition concedes that the City properly determined the total costs (base costs plus maximum costs due to peaking) that can be allocated to the irrigation class and to the SFR class. There is no issue here, as there was in *Palmdale*, that one customer class is improperly bearing a disproportionate cost of service relative

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[12] The peaking factors at issue are not all that similar. There is a large difference in peaking factors between tiered outdoor water users in the single family residential class. Tier 3 users have a 1.82 peaking factor whereas Tier 4 users have a 2.31 peaking factor.

to another class of customers. The City's rate structure does not result in single family residential customers as a whole being charged for costs properly borne by the irrigation class.

Furthermore, the disparity in variable rates between residential and irrigation use of outdoor water is adequately explained by the rate study in conformity with *Palmdale*. The key is the relative sizes of the residential and irrigation classes, and the corresponding disparity in demands they place on the water utility. Based on actual data that is not contested by the Coalition, the irrigation class represents a small fraction of overall use of water, both for base usage (4.6 percent) and for maximum usage (5.2 percent). Single family residential use, in contrast, is almost nine times as large (40.1 percent of total base usage and 45 percent of total maximum usage). Given the significant difference between the sizes of these customer classes, the Coalition's narrow focus on peaking factors is misplaced. Although the peaking factors are similar, each factor represents only the proportionate demand *within* that customer class (i.e., the peak demand of the irrigation class relative to its own average demand, and the peak demand of the SFR class relative to its own average demand).[13] The peaking factor for each class does not show the proportionate demand that

[13] The City's data showed, for example, that the irrigation class added additional demand of only 38,894 units between an average and a peak month, whereas the SFR class added additional demand of 326,993 units between an average and a peak month.

each class places on *overall* demand and the corresponding cost to the overall system. The City properly employed a methodology where the peaking factors are not the only factor that goes into variable rates. The rate study envisions variable rates that are allocated "to each customer [class] based on their *proportional average* and peak demands." (Italics added.) Because the allocation of base and maximum costs are apportioned by the relative demands placed on the overall system by each class (a per unit variable rate for irrigation customers, and a higher per unit variable rate for single family residential customers), the rate structure justified the rate disparity even though the average single family residential peaking factor is similar to the irrigation peaking factor.

## DISPOSITION

The portion of judgment invalidating the City's variable rates for residential customers is affirmed for the reasons set forth in this opinion. The portion of the judgment invalidating the public fire protection fee as a component of fixed rates is reversed. Each party is to bear its own costs on appeal.

MOOR, Acting P.J.

We concur:

KIM, J.

SEIGLE, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.